Supreme Court, U.S.
FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1420

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FEDERICO EREBIA,

Petitioner,

-vs-

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION

Of Counsel for Respondent Chrysler Plastic Products Corporation:

FULLER & HENRY
One SeaGate
17th Floor
P.O. Box 2088
Toledo, Ohio
43603

*JOHN J. SILICIANO
STEPHEN J. STANFORD
MARY ANN WHIPPLE
One SeaGate
17th Floor
P.O. Box 2088
Toledo, Ohio 43603
Telephone: (419) 247-2500
Attorneys for Respondent Chrysler Plastic Products Corporation

*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Is an employee who has violated the civil rights of other employees through his own misconduct in sexually harassing females working under his direct supervision in a factory entitled to equitable relief of reinstatement and front pay under Title VII?

2. Is a plaintiff in a joint Title VII and Section 1981 employment case who has been awarded a substantial compensatory judgment under Section 1981, including future damages, entitled to a duplicative award of front pay under Title VII?

PARTIES

The parties to this proceeding in the United States Court of Appeals for the Sixth Circuit were petitioner Federico Erebia and respondent Chrysler Plastic Products Corporation.

As of May 11, 1987, Chrysler Plastic Products Corporation became a wholly-owned subsidiary of Acustar, Inc. Acustar, Inc. is a wholly owned subsidiary of Chrysler Motors Corporation.

Except where the context otherwise requires, petitioner will be referred to as petitioner and respondent will be referred to as Chrysler.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

PARTIES..... ii

TABLE OF CONTENTS..... iii-iv

TABLE OF AUTHORITIES..... v-vi

OPINIONS BELOW..... 1

STATUTES INVOLVED..... 2-3

COUNTERSTATEMENT OF THE CASE.. 3-10

ARGUMENT - REASONS FOR DENYING THE PETITION.....10-24

I. The District Court and the Court of Appeals Fashioned a Proper Remedy Consistent With Public Policy and The Court's Prior Decisions, As Well As With the Particular Facts of This Case.....10-17

TABLE OF CONTENTS CONTINUED

Page

II. Petitioner's Request For Review Concerning Remedy Is Premature Because the Court of Appeals Remanded This Case For Further Consideration of the Possibility of Reinstatement To a Position, If Any, Where There Is No Potential For Further Sexual Harassment of Other Employees By Petitioner..... 17-19

III. The Petition's Emphasis On Title VII Remedy Is Misleading Because It Largely Ignores the Substantial Section 1981 Damage Award Predicated Upon a Jury Instruction Which Did Not In Any Way Limit Future Damages..... 19-24

CONCLUSION..... 24-25

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).....	11,12, 15,16
Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986).....	3
Henry v. Lennox Industries, Inc., 768 F.2d 746 (6th Cir. 1985).....	18
Int'l Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).....	11,13, 15,16, 19
Johnson v. Railway Express Agency,Inc., 421 U.S. 454 (1975).....	22-23
Muldrew v. Anheuser-Busch, Inc., 554 F.Supp. 808 (E.D. Mo. 1982) aff'd, 728 F.2d 989 (8th Cir. 1984).....	20
Shore v. Federal Express Corp.,777 F.2d 1155 (6th Cir. 1985).....	11,18
Williams v. Trans World Airlines, Inc., 660 F.2d 1267 (8th Cir. 1981).....	20

Statutes

Page

Title VII of the Civil Rights Act of 1964, §706(g), 42 U.S.C. §2000e-5(g) (1981)..... 10,18

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq (1981)..... passim

Civil Rights Act of 1866, 42 U.S.C. § 1981 (1981)..... passim

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was filed November 25, 1988. It is unreported. The opinion is reproduced in petitioner's appendix (hereinafter "appendix"). Rehearing and rehearing en banc were denied on December 23, 1988.

The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Northern District of Ohio, Western Division, was filed December 24, 1986. It has been printed in the appendix, at 55. A second judgment was entered on December 29, 1986. It has been reproduced in the appendix, at 52.

STATUTES INVOLVED

This petition involves Sections 704(a) and 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-3(a) and 2000e-5(g) (1981) ("Title VII") as set forth in the petition, at 6-8. In addition to Title VII, this proceeding also involves the Civil Rights Act of 1866, 42 U.S.C. §1981 (1981) ("Section 1981"). Section 1981 has not been set forth in the petition, but is set forth below:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties,

> taxes, licenses, and exactions of every kind, and to no other."

COUNTERSTATEMENT OF THE CASE

This is a joint Title VII and Section 1981 employment case, a fact which is especially significant to the question of remedy which petitioner seeks to have the Court review.

The same parties in this case litigated another joint Title VII and Section 1981 case before this one. The substance and procedural history of the prior case are set forth in Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986). The prior case is noteworthy here because the Court declined to review Chrysler's petition challenging the prior remedy.

After the trial in the prior litigation, employees working under petitioner's direct supervision in a Chrysler plant complained to other Chrysler management that they were being sexually harassed by petitioner. Appendix, at 57, 62. Petitioner was then discharged from his employment as a supervisor with Chrysler. Appendix, at 59.

Petitioner filed his complaint in the United States District Court for the Northern District of Ohio, Western Division ("District Court"), alleging retaliatory discharge under both Title VII and Section 1981. The only relief specifically sought by petitioner in the complaint was compensatory damages for wages, punitive damages and attorneys' fees. No request for

reinstatement was included in the complaint. In fact, petitioner first made his request for reinstatement well into trial. Appendix, at 67.

Petitioner tellingly fails to point out until page 31 of the petition that, at trial, petitioner argued for and the jury was instructed to consider compensatory damages of every type, from the time of discharge forward. There was no forward time limitation placed upon any award of wages or other compensatory damages. Petitioner's counsel argued as follows to the jury:

> "Gentlemen, I implore you, use your individual and collective common sense to right a wrong. I implore you gentlemen in compensatory damages to recall, if you are to award full and fair compensation, and <u>that means every type of injury sustained</u>

> and every instance of every injury sustained, each time each occurs, for the past, the present and the future. It is your duty to make that determination and not to shrink from it merely because in adding it up and comparing it to other values you think it is too high.
>
> "It is your duty to award that fair compensation based on the total past, present, and future of every injury, each time, each type, or you failed to do what you promised to do today."
>
> (Tr. at 659; emphasis added.)

In turn, the District Court instructed the jury that an award of damages could involve "the damages that have occurred from the time of the discharge, on August 20, 1984 on." Tr. at 687. Based upon this argument and instruction, the jury awarded petitioner $75,000 in compensatory

damages. It also awarded an additional $55,000 in punitive damages. The District Court entered judgment on the jury's verdict.

After trial, petitioner filed a motion for reinstatement. The District Court considered both the Title VII claim and petitioner's motion for reinstatement. Harmonizing the Section 1981 and Title VII claims, the District Court determined that reinstatement was inappropriate and allowed front pay of one dollar. Appendix, at 68-70. The District Court also awarded plaintiff total attorneys' fees of $21,018.75 and costs of $345.70. Appendix, at 75.

Reinstatement was found inappropriate for two independent reasons (neither of which is dicta as asserted

by petitioner). First, petitioner's own conduct in sexually harassing employees under his supervision created an intolerable atmosphere of hostility. Second, plaintiff waived the right to reinstatement because he did not request it until too late. Chrysler was thus prejudiced in its defense of this remedy at trial because of the tardiness of petitioner's request. Appendix, at 67-68.

The District Court determined additional front pay was inappropriate because petitioner was fully compensated by the jury award. Appendix, at 64.

Both parties appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). The Sixth Circuit affirmed the District

Court's judgment in all respects except for reinstatement. The jury's $130,000 monetary award was affirmed and the $1.00 in front pay was affirmed. Remanding the case, the Sixth Circuit instructed the District Court to consider "whether there is another equivalent position for Erebia available at CPPC for prompt reinstatement which would not involve the same potentiality for sexual harassment." Appendix, at 36, 43.

After a petition for rehearing and rehearing en banc was denied by the Sixth Circuit, the instant petition for certiorari was served upon Chrysler. On its face, the petition shows no good reason for this Court to review the decision of the Sixth Circuit, especially not at this

particular point in time. For the additional reasons set forth below, review by the Court is neither warranted nor appropriate.

ARGUMENT - REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT AND THE COURT OF APPEALS FASHIONED A PROPER REMEDY CONSISTENT WITH PUBLIC POLICY AND THE COURT'S PRIOR DECISIONS, AS WELL AS WITH THE PARTICULAR FACTS OF THIS CASE.

Given the particular facts and circumstances of this case, the denial of front pay to petitioner is consistent with the policy and precedent of Title VII relief.

The range of permissible remedies available under Title VII is stated in 42 U.S.C. § 2000e-5(g). Back pay is specifically listed, but front pay is not. The application of these remedies in particular cases is left to

the discretion of the trial court. They are discretionary, not mandatory.

The Court set forth its guidelines for trial courts to apply in fashioning appropriate Title VII remedies in Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-416 (1975). The remedies which trial courts may grant under Title VII, including back pay, reinstatement and front pay, are all equitable in nature. Albemarle, 422 U.S. at 417-418 (back pay); Int'l. Brotherhood of Teamsters v. U.S., 431 U.S. 324, 375-376 (1976) (reinstatement); Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985) (front pay). Thus, basic principles of equity must be applied in accordance with the dual Title VII statutory purposes of "eradicating

discrimination throughout the economy" and "making persons whole for injuries suffered through past discrimination." Albemarle, 422 U.S. at 417-421. District courts are instructed to carefully articulate their reasons for awarding or denying particular remedies among those in the Title VII panoply, while courts of appeals are cautioned that "the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." Albemarle, 422 U.S. at 421-422.

In this case, the District Court and the Sixth Circuit properly applied these principles and exercised their discretion in evaluating and fashioning a remedy. The remedy included wages within the jury's $75,000

compensatory damages award, by virtue of the trial court's instruction of the jury on this issue, and $1 in front pay, plus attorneys' fees. Reinstatement and additional front pay were appropriately denied by the trial court because of Mr. Erebia's harassment and mistreatment of other Chrysler employees who worked under his supervision.

The Court recognizes that in applying basic equitable principles to Title VII remedies it is entirely appropriate to consider the rights and concerns of other innocent employees. Teamsters v. U.S., 431 U.S. at 374-375. A balance of the competing interests of all the employees is necessary. In Teamsters, the Court upheld a determination that the

defendants, an employer and a union, violated Title VII with a pattern and practice of discrimination against black employees. The Supreme Court remanded the case to the district court to conduct hearings on the appropriate remedy for individual victims of discrimination, with the following instructions to balance the rights and interests of other employees:

> "Although not directly controlled by the Act, the extent to which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation

> between the public interest and private needs as well as between competing private claims.' Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.'"
>
> (431 U.S. at 374-375; footnotes and citations omitted.)

The District Court's remedy in this case, consisting of a monetary award of $130,000 and attorneys' fees, is a balance of what is fair and workable pursuant to Albemarle and Teamsters. Front pay and reinstatement, as any other available equitable remedy under Title VII, are

discretionary. Any award must be made in view of the overall circumstances of a particular case. The goal of Title VII is to eradicate discrimination; an award of additional front pay to or reinstatement of a supervisor found to have harassed female employees under his direct supervision would be a twisted, unintended application of the make-whole purpose of the statute. Indeed, to positively effectuate the statutory purpose of eradicating discrimination from the economy as a whole, it would be an abuse of discretion to award Mr. Erebia either reinstatement or additional front pay. There is nothing about this case that conflicts with Albemarle and Teamsters or that necessitates reexamination by the

Court of the general guidelines of Title VII relief set forth therein.

II. PETITIONER'S REQUEST FOR REVIEW CONCERNING REMEDY IS PREMATURE BECAUSE THE COURT OF APPEALS REMANDED THIS CASE FOR FURTHER CONSIDERATION OF THE POSSIBILITY OF REINSTATEMENT TO A POSITION, IF ANY, WHERE THERE IS NO POTENTIAL FOR FURTHER SEXUAL HARASSMENT OF OTHER EMPLOYEES BY PETITIONER.

Petitioner's statement of the question presented complains of a denial of both front pay and reinstatement. Any review of the issue of reinstatement under the circumstances of this case is premature because the Sixth Circuit remanded that issue to the District Court. Appendix at 36, 43. It may or may not ultimately be determined that petitioner is not entitled to reinstatement.

Review of the Sixth Circuit's affirmance of the denial of front pay is no less premature. Front pay is not a remedy specifically established by Congress in 42 U.S.C. § 2000e-5(g). Rather, front pay is a discretionary equitable remedy sometimes awarded where reinstatement is inappropriate. Shore v. Federal Express, Inc., 777 F.2d 1155, 1159 (6th Cir. 1985); Henry v. Lennox Industries, 768 F.2d, 746, 753 (6th Cir. 1985).

This petition improperly seeks to isolate the front pay question from the $130,000 Section 1981 damage award. Just as significantly, the petition also improperly seeks to isolate the front pay question from the other aspect of potential Title VII relief available here --

reinstatement. The balancing process necessary to arrive at that "special blend of what is necessary, what is fair, and what is workable" is impossible without consideration of the entire potential remedy. Teamsters, 431 U.S. at 375.

Accordingly, assuming solely for the sake of argument that this issue would ever be appropriate for review, now is certainly not the time. Court review at this time would be completely premature given the lack of a final determination on the reinstatement question which has been remanded to the District Court.

III. THE PETITION'S EMPHASIS ON TITLE VII REMEDY IS MISLEADING BECAUSE IT LARGELY IGNORES THE SUBSTANTIAL SECTION 1981 DAMAGE AWARD PREDICATED UPON A JURY INSTRUCTION WHICH DID NOT IN ANY WAY LIMIT FUTURE DAMAGES.

The gravamen of petitioner's argument is that he was denied appropriate Title VII relief because he was not awarded front pay. The unstated implication of this argument is that he is entitled to two awards of front pay.

Petitioner's focus on Title VII remedies ignores the dual Title VII/Section 1981 nature of this case. As the Sixth Circuit correctly determined, claimants in such dual cases are entitled only to one recovery of damages, even if two violations of law are found. See also, Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1274 (8th Cir. 1981); Muldrew v. Anheuser-Busch, Inc., 554 F.Supp. 808 (E.D. Mo. 1982), aff'd, 728 F.2d 989 (8th Cir. 1984). In Muldrew,

plaintiff was awarded $125,000.00 by a jury on a Section 1981 claim. The trial court refused an additional monetary award under Title VII, because "[w]here a person is claiming employment discrimination under both Title VII and 42 U.S.C. § 1981, he is entitled to only one recovery of damages."

This legal principle is particularly applicable here because the jury awarded all past and future damages which it felt petitioner was entitled to based upon the evidence at trial. Petitioner's counsel strenuously argued that the jury should predicate its award on the future as well as the past. The District Court so instructed the jury. Neither the District Court nor the Sixth Circuit

abused their discretion by refusing double monetary compensation for the same injury.

Petitioner finally addresses the impact of the Section 1981 jury award on his Title VII argument on page 21 of the petition. The $130,000 Section 1981 award is dismissed by petitioner as insignificant on the basis of citation to Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975). Johnson does not hold that claimants in dual Section 1981/Title VII cases are entitled to a double recovery of front pay. The Court in Johnson holds that Section 1981 and Title VII offer separate but related remedies. For example, Section 1981 offers claimants the possibility of punitive damages, such as awarded here

to petitioner. Title VII does not. Congress has noted, and the Court quotes in Johnson, that the provisions of Section 1981 and Title VII "augment each other and are not mutually exclusive." Johnson, at 459 (quoting H. R. Rep. No. 92-238, p. 19 (1971)). This case represents an area of overlap, where claimant is entitled to compensatory monetary relief either under Section 1981 or under Title VII, but not both.

The District Court and the Sixth Circuit correctly denied petitioner a double compensatory monetary award for the single injury he has sustained. There is no basis for granting certiorari to determine whether petitioner should be awarded more front pay under Title VII when a jury

awarded everything he was entitled to under Section 1981.

CONCLUSION

As demonstrated by this brief, the petition is procedurally premature and substantively without basis for certiorari. The District Court and the Sixth Circuit have thus far fashioned a remedy in this joint Title VII/Section 1981 case which fairly and equitably recognizes the civil rights of all of the parties in this case, including the victims of petitioner's sexual harassment. For the foregoing reasons, the petition for certiorari should be denied.

Of Counsel for Respondent Chrysler Plastic Products Corporation:

FULLER & HENRY
One SeaGate
17th Floor
P.O. Box 2088
Toledo, Ohio
43603

Respectfully submitted,

* JOHN J. SICILIANO
STEPHEN J. STANFORD
MARY ANN WHIPPLE
One SeaGate
17th Floor
P.O. Box 2088
Toledo, Ohio 43603
Telephone: (419)
247-2500
Attorneys for Respondent Chrysler Plastic Products Corporation

* Counsel of Record

March 28, 1989